Aker Plastics Company, Inc. and Kathy Fort. Case 25-CA-13164

July 21, 1982

DECISION AND ORDER

MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 23, 1982, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Aker Plastics Company, Inc., Plymouth, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

- 1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:
- "(b) Expunge from its files any reference to the discharge of Kathy Fort on December 8, 1980, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her."
- 2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discourage you from membership in or activities on behalf of United Steelworkers of America, or any other labor organization, by discharging or otherwise discriminating against you in any manner in regard to your rates of pay, wages, hours of employment, hire or tenure of employment, or any term or condition of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL offer Kathy Fort immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered, plus interest.

WE WILL expunge from our files any references to the disciplinary discharge of Kathy Fort on December 8, 1980, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

AKER PLASTICS COMPANY, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard at Plymouth, Indiana, on September 28

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

and 29, 1981. The charge was filed on February 17, 1981, by Kathy Fort, an individual, against Aker Plastics Company, Inc., herein called Respondent. The complaint was issued on April 6, 1981, and alleges that Respondent violated Section 8(a)(1) and (3) of the Act by the discharge of employee Kathy Fort because of union and other concerted activities protected by the Act.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by both parties.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Indiana corporation, maintains its principal office and plant at Plymouth, Indiana, where it is engaged in the manufacture, sale, and distribution of fiberglass bathtubs and basins and related products. During the 12-month period ending April 16, 1981, Respondent in the course and conduct of its business operations at Plymouth, Indiana, sold and shipped from its plant products and materials valued in excess of \$50,000 directly to points outside the State of Indiana. For the same period of time it purchased and received at its plant products and materials valued in excess of \$50,000 directly from points outside the State of Indiana.

It is admitted, and I find, that Respondent is and has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the United Steelworkers of America, herein called the Union, is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent in December 1980 employed about 120 employees on two shifts. About 70 employees were employed on the first shift, of whom 10 were assigned to the final finish department. Respondent's president and general manager is Don Aker who maintains his office at the plant. Subordinate to Aker is Plant Manager Stan Edel, Production Foreman Jeff Birchmeier, final finish foreman, Kevin Chaney, and the gel area foreman, Greg Holland, who are all admitted supervisors within the meaning of the Act.

Kathy Fort was employed from August 1978 until October 1979 when she quit, and again from January 1980 until she was discharged on December 8. Fort was employed on the day shift in the final finish department, as was her friend Laura Pippenger Mathews who was employed from 1978 until she voluntarily quit in January 1981.

On Saturday, November 15, Fort and Mathews attended an educational seminar where they obtained, inter alia, information regarding union organizational rights of employees. Fort and Mathews thereafter made contact with the Union and eventually arranged to meet with Union Representative Don Winslow at Warsaw, Indiana. Prior to the meeting with Winslow, according to Fort and Mathews, they met, upon their request, with Don Aker, Chaney, and Edel at the plant on November 17 or 18, in Aker's office at the end of the workday.

Fort and Mathews characterized the purpose of the meeting as a last effort on their part to induce Aker to improve working conditions affecting all employees before engaging in union organizing efforts. According to them, a variety of complaints of working conditions was raised by them, including lack of adequate heat in winter, fumes from chemicals and machines, the mess left over by night-shift employees which day-shift employees were called upon to clean, and complaints concerning their supervisors. Fort and Mathews also testified that the subject of the forthcoming newly instituted plant Christmas party was raised and that they complained about it inasmuch as it resulted in the loss of the employees' past annual \$20 Christmas bonus, as well as having other perceived disadvantages. Aker and Chaney in their testimony sought to characterize the nature of the meeting as that of a discussion of Mathews' persisting health problems and resulting high absenteeism. Edel did not testify. Fort and Mathews conceded that part of the discussion incidentally related to the impact of plant fumes upon Mathews' health. Mathews testified she had manifested certain allergy symptoms since July which had caused her a high degree of absenteeism, and according to her uncontradicted and credible testimony she had informed Chaney 2 months earlier that she was undergoing tests conducted in a hospital to ascertain the cause of her symptoms. She conceded that 2 months earlier Chaney and Edel complained to her that she was not performing her fair share of the work, that she could not be depended upon, and that Edel told her several times that Respondent would have to get someone more dependable. On cross-examination, Mathews denied that the "only" or "basic" reason for the meeting was to discuss her health problems, although she conceded that she had previously told fellow employees that she was concerned about whether she could retain her job through Christmas. At one point in her testimony she conceded that the plant fumes were also her personal complaint because she felt that it was at the root of her allergy problems and conceded that that was the "main reason" she was present at the meeting but added that she was "pretty unhappy with the rest of the working conditions too." She conceded that she is an emotional person who "sometimes" has difficulty speaking for herself, and that that was one of the reasons Fort accompanied her to the meeting with Aker.

Aker was oblique in his testimony regarding the meeting and only peripherally touched upon the November meeting. He did not testify as to when that meeting occurred nor did he narrate the substance of it. Chaney testified initially that the meeting occurred in pursuance to

¹ All dates herein, unless otherwise indicated, are 1980.

a letter dated November 20 that Mathews had received from her physician and that he heard no discussion of matters other than Mathews' health and her absenteeism. However, on cross-examination he conceded that the discussion "possibly" involved the lack of heat in the plant and also involved the fumes. He conceded that Fort, during the meeting, complained of the lack of access to him by employees. He testified that he did not recall a discussion of the night shift's mess at the meeting but that Fort had complained about it in the plant more than once. Upon redirect examination, after several suggestive questions, Chaney testified regarding the discussion of fumes: "It sounded to me like they were talking about Laura's problem." Chaney's testimony with respect to the non-Christmas party topics was generalized and marked by a high degree of uncertainty in demeanor. It was not corroborated by detailed testimony of Aker, nor by any testimony of Edel, who for unknown reasons did not testify at the hearing.

On these topics Fort and Mathews were detailed and more certain. I therefore conclude that on November 17 or 18 Fort and Mathews not only discussed Mathews' health problems, but also complained about the lack of heat in the plant, the fumes in general, about supervision, and about the night-shift mess that day-shift employees were compelled to clean. I also credit their testimony that the meeting preceded the November 20 medical statement.

A great deal of testimony related to whether or not Fort and Mathews also complained of the forthcoming Christmas party at the November meeting. Aker and Chaney adamantly insisted that that topic was not discussed. Aker testified that the idea of a Christmas party in lieu of not only the Christmas bonus, but also in substitution for the annual Thanksgiving Day party, was not yet "born." Fort and Mathews insisted that shortly before the meeting they had heard rumors that a Christmas party was to be held in lieu of the Christmas bonus. They both testified that they complained about the loss of the Christmas bonus, and a proposed admission fee to the party, and that Aker responded that he could no longer afford the \$20 yearly bonus.²

Employee Ida Miller testified that the idea of a Christmas party in lieu of a Thanksgiving Day party was suggested to Aker by her on Thursday or Friday, November 20 or 21, as part of a discussion relating to the preparations as yet not taken for the annual Thanksgiving Day party. Miller testified that Aker responded that he would think about it. Aker testified that this occurred "2, 3 or 4 days" before Thanksgiving Day which fell on November 27. Miller testified that the reason she approached Aker was that it had been customary for her to prepare the meat for the party and, as yet, she had not heard from Aker, and she was concerned about being able to prepare in time. She testified that she made her suggestion for a Christmas party when Aker told her that there could be no Thanksgiving Day party that year because of the increased size of the plant. However, Aker's testimony regarding another subject to be discussed more fully hereafter, i.e., the defacement of the Christmas party announcement memo, is revelatory. Aker testified that on December 8 he entertained the thought that Mathews might have been involved in the defacement of December 8 because she had been to his office previously and had engaged in a discussion with him. The November discussion was the only meeting that had transpired before December 8. The only rational basis for Aker to have made such a connection is that the subject of the Christmas party was raised at that meeting. I therefore conclude that at the meeting on or about November 17 or 18, Fort and Mathews did complain about the loss of the annual bonus, the requirement of an admission fee to the Christmas party, and that Miller was either mistaken as to the date of her conversation, or that Aker had already considered holding a Christmas party and mentioned it to others before Miller was made aware of it.

The day following the November meeting, according to Mathews' testimony which I credit, Chaney asked her for a statement from her physician setting forth her medical problem, and stated to her that "maybe" Respondent could help her. Within a few days Mathews obtained a medical statement from her physician dated November 20, and gave it to Chaney. The statement was drafted in the form of a letter addressed to Respondent and was signed by Dr. Guild and set forth, inter alia, a recital of symptoms that had persisted for 6 months, the fact that Mathews had been examined by an allergist, the "feeling" that there was a "possible connection between her symptoms and her work," the suggestions that "perhaps" there were fumes or toxic materials causing the symptoms, and the fact that the physician suggested to Mathews that "she remove herself from any areas that she can identify as having odors and dust particles in the air."

On or about December 1, Mathews was contacted by a union business agent and a meeting was arranged for Saturday, December 6, at a place in Warsaw, Indiana.

During this time Fort in conversations with coworkers became an outspoken critic of the Christmas party and encouraged fellow employees to boycott the party. On Thursday, December 4, Aker distributed a memorandum which announced the Christmas party, set forth the date, time, and place, and stated that the event would entail a cocktail party, a catered buffet dinner, dancing, door prizes, a limit of one guest per person, a donation of \$2.50 per person, and a requirement that reservations be made before 3:30, p.m., Tuesday, December 9. Multiple copies were placed on the tables in the lunchroom, and one copy was posted at the bulletin board area near the timeclock.

On the morning of Thursday, December 4, during the break period, in the lunchroom, according to Fort's testimony, she and several employees, excluding Mathews, discussed the memo, which Fort read aloud and criticized. Several employees made suggestions as to what comments might be written on the memo, and Fort thereupon scribbled the following remarks: In the left margin she wrote "Hoot Off," which she testified was a locally used expression equivalent to "screw off" or "kiss

² Aker credibly testified that the cost of the party actually exceeded the cost of a \$20 per person bonus by 30 percent.

off." She added in the margin "limit 2 drinks," and "cold beans, cold Baked potatoes, Gr. beans, Salisbury steak, Hot dogs & beans." Adjacent to "Dancing" she wrote "To the rousing 20's." Next to "door prizes" she wrote:

1st prize TS60 [i.e., Respondent's product, a tub] 2nd prize 2nd TS60 3rd prize Picture of Don Aker w/Darts

The defaced memo was left on the table. It remained there for the day, but was not seen by Fort the next day.

Aker testified that by Friday, December 5, there was a dearth of reservations for the party, particularly among the final finishers. He therefore talked to his foreman who reported to him that rumors were being spread which denigrated and misrepresented the nature of the party.

On Saturday, December 6, Fort and Mathews met with union agent Winslow in Warsaw, signed union authorization cards, and obtained other union authorization cards.

On Monday morning, December 8, according to Aker's testimony, his attention was brought to the defaced memo at or about 9:30-9:45 a.m. by his son Mark, an employee who is one of several relatives of Aker employed in the plant, who placed the memo on his desk and who told him that he had heard employees making a "mockery" of the Christmas party "down there," and that when he went to investigate he found the memo. There is no explanation as to why this memo was not brought to Aker's attention the preceding Friday by the foreman who had brought him the earlier reports of employee discontent. Aker testified that he assumed that the memo had been posted on the bulletin board although Mark Aker did not say so. Aker testified that he became upset that someone whom he was paying \$200 a week "hated" him to such an extent as to suggest that darts be thrown at his photograph. He did not testify that he was aware of the meaning of the phrase, "hoot off," or whether he considered it to have been used as an adjective or as an imperative verb. Aker testified when questioned whether he had decided to discover the identity of the employee responsible for the defacement:

I never even thought of it, until—I never dreamed anybody would admit it. I figured that if I could find out who it, was, yes, I'd fire them.

However, he further testified: "I wasn't trying to really find out [who was responsible]," because of the ensuing events.

On the morning of Monday, December 8, Fort and Mathews took to work union authorization cards but did not mention the Union to anyone until the first break periods at 8:45 to 9 a.m. in the breakroom (i.e., lunchroom), when they talked to different groups of employees at different tables. Fort spoke to a group of 10 employees, including Kevin Birchmeier, the brother of Supervisor Jeff Birchmeier, about the benefits of union representation and solicited their authorizations for representation. Mathews explained to the group of eight employees with whom she sat that Fort had union cards and that, if they were interested, to let either Fort or her know. Employ-

ees at both tables discussed the advantages and disadvantages of union representation. One employee signed a union card for Fort, and another, Brian Eckman, accepted a card, while others expressed a negative reaction. Fort and Mathews later resumed similar discussions at the beginning of the lunch period in the lunchroom.

Between the first break and the lunch period, rumors of Fort's and Mathew's union solicitations became widespread. Respondent's witness, patcher painter Mary Myers, whose duties take her throughout the plant, described the situation as a "commotion in the plant." Myers assumed at the time that Fort was responsible for the union solicitation because of Fort's past openly expressed dissatisfaction "with everything at work." Gel Area Foreman Holland confirmed in his testimony that Fort was known as an outspoken complainer of working conditions.

Within 3 minutes after the end of the first break period, Eckman took the union authorization card that he had accepted from Fort and showed it to Holland and they engaged in a discussion of the relative advantages and disadvantages of union representation. Eckman testified with a reluctant demeanor and did not disclose the details of the conversation. Holland testified that not only Eckman but that also Kevin Birchmeier reported to him at or about 9 a.m. that union cards were being distributed. He also testified that they were later augmented by six other employees, including David Bowers. He testified that he had assumed that Eckman and Birchmeier had just left the breakroom. He further testified that as of 12:30 p.m. he did not know "for sure" who passed out cards but that he could not recall whether he asked employees who were distributing the cards. He testified that he did not become aware of, as a result of those reports, the identity of those persons. He then testified that, although he was curious, he did not question employees as to the identity of the card solicitors. Bowers was called as a witness for the General Counsel, but he was as reluctant in demeanor as Eckman, and he also did not reveal the details of his conversation with Holland within 1 hour after lunch, except that he and Holland agreed that it would be foolish to try to organize the plant and that Don Aker would not like it. He did testify without contradiction that Holland stated that Don Aker would "fight it all the way." He had no recollection as to whether the identity of the card solicitors was discussed.

Holland testified that after he talked to Eckman and Kevin Birchmeier, but before any further reports, he relayed their reports to Edel who told him to forget it and not to talk to anyone about it.

Ida Miller, an employee engaged in mold repair work, testified without contradiction that while she was at work in her department at some time between first break and the lunch period, Stan Edel asked her as he walked by, whether she had heard any rumors. She responded negatively. Later she had lunch with Meyers in the lunchroom and was told by Meyers that Fort was attempting to solicit support for the Union. Meyers testified that she and Miller are known in the plant as "snitches."

Aker testified that he decided to confront the finishing department employees in the lunchroom at the end of their lunch period for the purpose of explaining to them the details of the Christmas party and to clear up any misunderstandings about it. He took the defaced memo with him. Nonfinishers proceeded to go back to work as Aker addressed only the finishers. He explained the details of the party and the purpose of the admission fee; i.e., door prizes. He testified that as he finished he pulled from his pocket the defaced memo and held it out and stated:

Now, we're going to have a nice party . . . and look here what somebody did. Defaced this, here's what they think of our party.

According to Aker, at this point Fort stated, "I did that, and I think it's funny." Aker testified that he asked all present whether they heard the admission but that although he was "burning with anger," he did not wish "to take any action in front of all these people." Aker testified that Fort then stated that she "wasn't the only one." He asked her "who else was with you, Kathy," to which she answered, "I'm not telling." Aker testified that he then concluded the meeting by stating, "Well, we're all going to have our party, we want you all to come, and you, too, Kathy." Aker then went to lunch. Chaney, who claimed to be present, generally corroborated Aker, as also did employee Donna Hardesty.

The testimony of Fort and Mathews, with respect to the lunchroom meeting, varies from that of Aker. They testified that Aker extended the memo towards Mathews and asked either who wrote on it or "what do you know about this?" whereupon Fort asserted that she wrote upon the memo and that Mathews was not present when it had occurred, at which point Aker looked at Edel who had joined the meeting and said "see she did it" or "I told you she did it," and thereupon told Fort that she "just blew" her chance for the head section job; i.e., a position of higher responsibility but equal pay. Fort then explained that she did it as a joke and that she was sorry. Aker then said he thought it was not funny, but ended the meeting by inviting everyone to the party, including Fort.

Neither Chaney nor Aker explicitly denied the reference in Fort's and Mathew's testimony to the forfeiture of the head sectional job, and I credit the latter as more certain and convincing testimony in this regard.

Hardesty, who was partially corroborated by Mathews, credibly testified that, during the entire lunchroom conversation, Fort laughed and smirked, and in regard to the defacement said, "where's your sense of humor?" Mathews testified without contradiction that, during that part of the meeting when Aker reflected that virtually no finishers had made reservations for the party and asked whether anyone had said anything to discourage attendance at the party, Fort laughingly exclaimed, "Oh yes, I

have mind control over everybody!" At this point the employees present all laughed.

Although Aker was "burning" with anger, he did not immediately discharge Fort who sat before him laughing and smirking. Instead, he calmed down and expressed the desire that she attend the party. I therefore credit the testimony of Fort and Mathews, which was not explicitly contradicted, that Fort apologized at the meeting for her conduct. Although Aker had testified that when he first saw the defacement he was of a mind to discharge the person responsible and, although, according to his testimony, Fort asserted that other employees had collaborated on the defacement, Aker made no immediate effort to ascertain the identity of those other persons. Aker took no action until shortly before the end of the workday when he summoned Fort to Edel's office where, in the presence of Edel and Chaney, Fort refused to disclose the identity of the defacement collaborators. Aker then discharged Fort by issuing to her a termination notice which stated: "Discharged-Defacing Company Memo-Bulletin Board." Aker also stated to her that he would fire those employees who had joined in the defacement if Fort disclosed their names. Aker testified that he had erroneously assumed that the memo had been posted, and that he actually discharged Fort, not for the act of defacement per se, but because of the substance of what Fort had written on the memo.4

Aker was pressed by the counsel for the General Counsel to explain what efforts were made to uncover the identity of other employees who had joined Fort in the defacement either on that Monday afternoon or at any time. However, he hesitantly and most unconvincingly testified that he made only a "slight" attempt to do so, which consisted of summoning to his office Mathews whom he suspected may also have been responsible or who might have disclosed the identity of the other responsible employees. This suspicion was entertained by Aker because of Mathews' earlier visit to his office. Aker testified that he had planned on talking to Mathews on December 8 regarding her medical problem, and had hoped that she would also volunteer information regarding the defaced memo. However, when Mathews was summoned to the office by Aker, after Fort's discharge, Aker admittedly did not refer to the defaced memo either explicitly or implicitly. Instead, Aker discussed Mathews' medical statement dated November 20, which she had submitted to Respondent 2 weeks earlier. The details of that confrontation were testified to by Mathews credibly and without contradiction. At that meeting Aker told Mathews that he was concerned about her health and that he was worried about possible liability for injury she may suffer as a result of working conditions. She was asked whether she was being seen by a physician, to which she responded that she was, on a weekly basis. She was told that the November letter was "unclear" and that a work release was needed. She was urged to obtain one immediately. On December 8, Mathews later obtained another statement from her physician which in effect summarized the contents of the Novem-

³ Eckman recalled little of the conversation, but he corroborated Fort and Mathews to the extent that he heard Aker ask who had defaced the memo which then prompted Fort's admission. I find his testimony in this regard credible as he had nothing to gain by his testimony other than the alienation of his employer.

⁴ With respect to the exit interview, I credit the testimony of Fort which is essentially uncontradicted.

ber 20 letter to which it explicitly referred. Mathews delivered the December 8 medical statement to Respondent at 10 a.m. on December 9. She voluntarily did not report to work until December 10 because she was uncertain as to whether she desired to return to the plant which apparently to her was contributing to her illness. However, she reported to work on December 10 and was assigned to a lesser paying office position, away from the plant fumes, and away also from the plant employees whom she and Fort had solicited for union support. Mathews thereafter worked until January and resigned after she had submitted a written resignation which thanked Respondent profusely for its efforts to assist her in coping with her health problems.

Aker testified that, since Fort had refused to disclose the identity of her defacement collaborators, he simply dropped the matter.

The General Counsel adduced credible testimony to the effect that in prior years unknown persons had defaced company postings and had scrawled upon the walls of the restrooms unflattering references to Respondent's supervisors and managers, and that no formal meetings were conducted by Respondent for the purpose of discovering the authors.

Fort testified that she and Don Aker had maintained an informal, if not loose, employer-employee relationship throughout her employment. According to her testimony, she commonly and frequently greeted Aker in the plant in the presence of employees and outside visitors with loud, vulgar, but joking epithets, e.g., "tubby" (they both concurrently attempted dieting regimens); "shit face" (Aker grew a beard at one time); "fat fucker," and "cheap," and often accompanied such remarks with a pat of her hand on his posterior. She testified that Aker responded with a laugh and a joking retort, but never responded with a warning of discipline. Aker testified that Fort frequently directed vulgar language to everyone in the plant, including himself, but that on only one occasion did he do anything about it. In the summer of 1980, according to Aker, Fort directed some loud, vulgar comment to him in the presence of a customer. He testified that she particularly engaged in such conduct toward him when plant visitors were present. He failed to testify how long he had endured this treatment. He could not recall the comment. Aker did not contradict Fort's description of the vulgarities she used nor her testimony that he reciprocated with friendly retorts. Aker testified that he told Edel to tell Fort to desist from such conduct or else she would be fired "on the spot," and thereafter such conduct stopped. Fort denied that she was never reprimanded and insisted that she continued such conduct at least weekly until she was discharged. As Edel did not testify, I credit her testimony that she was not ever warned of discipline for such conduct. In view of this credibility finding, I conclude that there was therefore no reason for her to stop such conduct, and I credit her testimony that she persisted in it during the remainder of her employment, and that Aker continued to accept it.

Respondent adduced testimony to the effect that finishers are important workers whose job functions are essential to the flow of work, and that it is a matter of great inconvenience to replace a good finisher because of a 2- or 3-month training period to effectuate the required skills. Fort was considered by Aker to have been a "pretty good" worker, and her work quality was such as to have motivated him in rehiring her after she had quit an earlier employment for a better job from which she subsequently was laid off. Respondent's reluctance to lose finishers is evidenced by its lengthy tolerance of Mathews' high absenteeism record despite repeated warnings to her that she would have to be replaced.

Although Aker testified that it is an unspoken rule based upon commonsense not to deface company property, he testified, as noted above, that Fort was discharged for the substance of what she scribbled on one of many announcement memos. There is no evidence that Respondent maintains a formal or even an informal work conduct policy. There is no evidence of past discharges based upon employee insubordination or misconduct. There is no evidence in the record of past behavior indicative of Respondent's tolerance level of insubordination or lack thereof, other than what is recited herein.

Analysis

The General Counsel contends that Fort was discharged because of her union activities and alternatively because of her concerted protected activities; i.e., presenting complaints of working conditions affecting herself and other employees, including, *inter alia*, complaining of the loss of the Christmas bonus and substitution of a Christmas party.

Respondent argues that the General Counsel has failed to prove that Respondent was aware of and was hostile to Fort's union activities. Rather, it argues Fort was discharged for justifiable business reasons; i.e., insubordination. Knowledge of union activity, however, can be inferred from the circumstances; e.g., prevalence of rumors in the plant, size of unit, timing of the discharge, and pretextual nature of the reason proffered for the discharge. Wiese Plow Welding Co., Inc., 123 NLRB 616 (1959); Famet, Inc., 202 NLRB 409 (1973); Tayko Industries, Inc., 214 NLRB 84, 88 (1974); The Huntington Hospital, Inc., 229 NLRB 253 (1977); Speed-O-Lith Offset Co., Inc., 241 NLRB 928 (1979).

The court stated in Shattuck Denn Mining Company v. N.L.R.B., 362 F.2d 466, 470 (9th Cir. 1966):

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at

least where, as in this case, the surrounding facts tend to reinforce that inference.

The Board in reevaluating the burden of proof in dual motivation cases has recently explicated and announced the following causation test for cases alleging violations of Section 8(a)(3) or violation of Section 8(a)(1) turning upon employer motivation.⁵

First [the Board] shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the instant case I conclude that there is sufficient evidence to establish that Respondent was aware of Fort's union activities prior to the decision to discharge her. Fort was known to Respondent as a vigorous spokesperson for complaints of working conditions affecting herself and coworkers. She and Mathews had recently initiated a meeting with Respondent's managers at which several such complaints were raised. She had even more recently strongly criticized the substitution of a Christmas party for the yearly Christmas bonus to her fellow employees. The evidence reveals that foremen engaged in the practice of reporting such employee conduct to Don Aker; e.g., that rumors were being spread about the proposed party and that employees were making a "mockery" of the party. When Fort and Mathews attempted to distribute union authorization cards and to solicit union support, employees lost no time in reporting to Foreman Holland. I find it inconceivable that amidst all the reports received by Holland that he did not become aware of or assume the correct identity of the card solicitors. Holland had been a supervisor for only 3 months and had come to his position from a locale outside the plant, and yet Fort's reputation as an outspoken critic of plant working conditions was so widespread that Holland became aware of it after his appointment as a supervisor. It is inconceivable that Holland would not have connected Fort with the reports of union activity. Furthermore, I conclude that Edel, the plant superintendent, could not have failed to make the same connection. Indeed, Edel that morning attempted to obtain information as to "rumors" in the plant that morning, which plant, as characterized by Respondent's witness Hardesty, was in a "commotion" over union organizing efforts of Fort and Mathews. In addition to Holland, of course, there were other supervisors in the plant as well as relatives of Don Aker; e.g., Mark Aker, who had earlier reported employee discussions and attitudes and who could reasonably be expected to have reported rumors of union activity. I conclude that the inference must be raised that Donald Aker became aware of the union activities of Fort and Mathews at some point prior to 3 p.m. regardless of the size of the plant which in this case encompassed only 70 day-shift workers on Monday, December 8.6

The question then arises, did Aker discharge Fort because of her misconduct or because of her union activities which preceded her termination by a matter of several hours? The engagement in other unfair labor practices or expressions of animosity towards unions is, of course, relevant in motivational analysis. There is here a paucity of such direct evidence, apart from Foreman Holland's apparent speculation to employee Bowers. However, as the court of appeals noted in the Shattuck Denn case, supra, an inference of unlawful motivation can be raised if the proffered reason for discharge is found to be false.

Akers testified that he decided to discharge Fort during the meeting in the lunchroom when Fort had admitted to the defacement, but withheld his announcement because of the presence of other employees. I do not find this testimony credible. By all credible accounts of the witnesses, Aker became visibly angry when he alluded to the defaced memo but had calmed down at the end of the meeting when he specifically included Fort in the invitation to the party after, as I have found, Fort apologized for her conduct. It would have been unreasonable and perverse for Aker to have extended such an invitation had he made the decision to terminate her. Furthermore, it is also unreasonable that he would have then decided to discharge Fort when, in light of the credited evidence that prior to the end of the meeting before he calmed down, he announced to Fort that she had forfeited the loss of a promotion or job transfer. Such reference would have been superfluous, if not silly, if indeed a decision to terminate her had been made. I conclude that he had intended at most to deprive her of a promotion and that he implicitly accepted her apology by extending an invitation to her to attend the party. Tolerance of Fort's alleged misconduct is in accord with Aker's past practice which appears to have placed a preference to the retention of good finishers over the inconvenience of obtaining and training a replacement, even though replacement was justified by excessive absenteeism as is evidenced by Mathews' situation. Such tolerance is also in accord with Aker's past relationship with Fort. The scribblings on one of many party announcements do not appear to be much more personally insulting than some of the embarrassing epithets and actions directed to Aker by Fort on past occasions, but rather seem to be of the same nature of patently acerbic exchanges which were previously taken lightly. Thus, although it is possible that Akers would have been provoked to anger in light of his frustrations over arranging a Christmas party, it is also most probable that he forgave Fort at the lunchroom meeting. Finally, it does not seem reasonable that, if Aker were still secretly "burning" with anger after the meeting, that he would have waited until the end of the workday to discharge Fort. I conclude therefore that the decision to discharge Fort was not made at the lunchroom meeting and that it was not made because of the substance of the defacement

⁶ Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083, 1089 (1980).

⁶ At no time during his testimony did Aker ever deny such awareness or suspicion.

scribblings. I conclude that the decision to discharge Fort was made for the only other palpable reason; i.e., the elimination of a union organizer from the plant. Fort's discharge coincided nicely with Respondent's decision to remove the only other and more passive union organizer from the plant scene by transferring Mathews to an office area. The later decision was made only after months of pondering Mathews' fate while retaining her in her plant job, and made at a time when there appeared to be no precipitating event to make such decision other than the union activity of that very day.

I am unable to infer that Fort was discharged because of the concerted activities of herself and Mathews in protesting and complaining of working conditions of the employees. Aker was well aware of such activities but neither expressed concern over such activities per se nor did he act precipitately upon learning of this conduct as he did subsequent to the union card solicitations. At most, the record reveals that Aker was displeased with mischaracterizations of the Christmas party, and not merely because employees criticized the fact that a party was being given in lieu of a bonus. As I have found above, Aker did not discharge nor did he intend to discharge Fort during the lunchroom encounter when she admitted that she had defaced the party announcement. Accordingly, I conclude that he did not discharge her because of her criticism of the party as expressed in November or because of any other complaints she had raised. The General Counsel via the post-hearing brief moved to amend the complaint to allege that Respondent alternatively violated the Act by discharging Fort because of the comments that constituted the memo defacement. Inasmuch as this conclusionary allegation rests upon fully litigated events and is so integrally related to the allegations of the complaint, I hereby grant the motion. However, I have concluded that Respondent did not discharge Fort because of the written comments on the memo. Furthermore, I find that those comments do not constitute part of the res gestae of the concerted activities asserted to fall within the protection of the Act, as they are distinguishable from that type of excusable exuberant misconduct occurring spontaneously and concurrent with the protected activity.7

I therefore conclude that the General Counsel has sustained the burden of establishing a prima facie case of discriminatory discharge for union activities. I conclude further that Respondent has failed to adduce sufficient evidence upon which I would be able to find that Fort would have been discharged for misconduct regardless of the existence of an inferred unlawful motivation. The evidence fails to reveal that the discharge of Fort conformed to Respondent's past practice or policies regarding employee conduct or work discipline. As noted earlier, the evidence is to the contrary.

The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by Holland's interrogation of employee Bowers, and Edel's interrogation of employee Miller, both on December 8.

I conclude that Bowers' testimony failed to disclose sufficiently clear, certain, detailed, and unambiguous testimony upon which I can conclude that Holland coercively interrogated him. As to the Edel incident, it is reasonable to infer that Edel intended to obtain information about the Union, but all he asked Miller, one of the two plant "snitches," at the time was, had she heard any rumors. At that point she had not heard anything about the Union and therefore merely perceived the question as a meaningless general inquiry. I conclude that the context of the interrogation was sufficiently ambiguous so as to preclude me from finding that such a clouded inquiry would necessarily have been perceived by an employee as coercive interrogation of union activities of fellow employees.

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act by terminating the employment of Kathy Fort on December 8, 1980.

THE REMEDY

Having found that Respondent engaged in an unfair labor practice, I recommend that it be required to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

It having been found that the Respondent discriminatorily terminated the employment of Kathy Fort, it is recommended that Respondent be ordered to offer her immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and to make her whole for any loss she may have suffered by reason of the discrimination against her. Any backpay found to be due shall be computed in accordance with the formula as set forth in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977).8

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER9

The Respondent, Aker Plastics Company, Inc., Plymouth, Indiana, its officers, agents, successors, and assigns, shall:

⁷ Compare, for example, *United States Postal Service*, 250 NLRB 4 (1980), and cases cited therein.

^{*} See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).
In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

- 1. Cease and desist from:
- (a) Discouraging membership in or activities of its employees on behalf of the United Steelworkers of America, or any other labor organization, by discharging them or otherwise discriminating against them in any manner with regard to their rates of pay, wages, hours of employment, hire or tenure of employment or any term or condition of their employment.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under the Act.
- 2. Take the following affirmative action which is necessary to effectuate the policies of the Act:
- (a) Offer Kathy Fort immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."
- (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other docu-

- ments necessary and relevant to analyze and compute the amount of backpay under this Order.
- (c) Post at its plant in Plymouth, Indiana, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to any alleged violations of the Act not found herein.

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."